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Davis Bacon Expanded to Private Projects in Senate Immigration Bill

Executive Summary

- S. 2611, the Comprehensive Immigration Reform Act of 2006, contains a significant expansion of two wage laws, including the Davis Bacon Act. Specifically, S. 2611 expands Davis Bacon wages to foreign laborers working in private construction.

- In contracts over $2,000, the Davis Bacon Act requires that not less than the local prevailing wage be paid to all workers employed in federally contracted construction to which the United States or the District of Columbia is a party.

- Under S. 2611, Davis Bacon wage rates would be applied to foreign temporary workers in *all* construction occupations – even if the project receives no federal funds and does not otherwise fall under the Davis Bacon Act.

- Because participation in Davis Bacon wage surveys is voluntary, the Department of Labor is limited in its ability to establish accurate rates. The Department of Labor's Inspector General reported concerns with the integrity of Davis Bacon wage determinations. Specifically, the report found errors and bias in wage data, along with concerns with the timeliness of wage determinations.

- S. 2611 contains numerous alternative means to satisfy the prevailing wage requirement for foreign workers without expanding the reach of the Davis Bacon Act. Additionally, numerous other labor-related statutes already exist that provide for the protection of *all* workers in all U.S. workplaces.

- S. 2611 can be modified in a way that continues to protect American workers while not expanding Davis Bacon wages to private projects.

Introduction

As it passed the Senate, S. 2611, the Comprehensive Immigration Reform Act of 2006, contained the significant expansion of two wage laws, including the Davis Bacon Act. Specifically, S. 2611 expands Davis Bacon wages to foreign laborers working on private construction projects. Any revision to U.S. immigration law should continue to protect the wages and working conditions of American workers. Yet, S. 2611 would guarantee wages to some foreign workers that could be higher than those paid to American workers at the same worksite. This is unfair to U.S. workers, inappropriate, and unnecessary. S. 2611 can be modified in a way that continues to protect American workers while not expanding Davis Bacon wages to private projects.

Senate-Passed Bill Expands Davis Bacon and Service Contract Act

This paper deals with the provisions of the Davis Bacon Act[1] and the Service Contract Act[2] contained in S. 2611. These two labor laws currently do not apply to private-sector employees except when they are engaged in contract work for the federal government.[3] This section explains how these laws work and how they are expanded by S. 2611 beyond their traditional scope.

The Davis Bacon Act

The Davis Bacon Act of 1931, as amended, requires, among other things, that not less than the local prevailing wage be paid to all workers employed in federally contracted construction.[4] Under current law, the Davis Bacon Act (DBA) applies to contracts over $2,000 to which the United States or the District of Columbia is a party for the construction, alteration, or repair of public buildings or public works.[5] The DBA requires contractors and their subcontractors to pay workers employed at the work site not less than the local prevailing wages and fringe benefits that are paid on projects of a similar character. The Act requires the Secretary of Labor to determine local prevailing wage rates.[6] In practice, this determination often yields the area's union wage, which is generally higher than the non-union wage rate.[7]

Under the Davis Bacon Act, predetermined wage rates are to be paid to the various categories of laborers working under federally-funded construction contracts.

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[1] 40 U.S.C. §§ 276a - 276a-5.
[2] 41 U.S.C. §351, et seq.
[3] Congressional Research Service (CRS), "Federal Contract Labor Standards Statutes: An Overview," CRS Report to Congress RL32086, November 9, 2005.
[4] Congressional Research Service (CRS), "The Davis-Bacon Act: Issues and Legislation During the 109th Congress," CRS Report to Congress RL33363, April 25, 2006.
[5] U.S. Department of Labor (USDOL), "What are the Davis-Bacon and Related Acts?" June 12, 2006. [http://www.dol.gov/esa/programs/dbra/whatdbra.htm]
[6] USDOL, "What are the Davis-Bacon and Related Acts?."
[7] Congressional Budget Office (CBO), "Modifying the Davis-Bacon Act: Implications for the Labor Market and the Federal Budget," July 1983.

The law applies to all workers on a covered project, regardless of the size of the government's share of the project funding. Additionally, the law applies to all laborers on a covered worksite, whether they are U.S. workers or foreign workers.

The reach of the prevailing wage requirement in the Davis Bacon Act is expansive. In addition to the prevailing wage requirement contained in the Davis Bacon Act, Congress has added prevailing wage requirements to approximately 60 statutes, under which grants, loans, loan guarantees, and insurance assist construction projects. These so-called "related acts" involve construction workers in areas such as transportation, housing, air and water pollution reduction, and health.[8]

The Service Contract Act

While the DBA applies to *construction* work, the McNamara-O'Hara Service Contract Act (SCA) applies to contracts in excess of $2,500 entered into between an employer and the United States or the District of Columbia where *services* are provided to the federal government or the District of Columbia. The law requires that affected service employees be paid "no less than the wage rates and fringe benefits found prevailing in the locality, or the rates (including prospective increases) contained in a predecessor contractor's collective bargaining agreement."[9] Like the DBA, the SCA applies to all workers employed under a SCA contract regardless of status (i.e. both U.S. workers and foreign workers). Dissimilar to DBA, the Service Contract Act utilizes statistically valid wage data from the Bureau of Labor Statistics. So while the Service Contract Act is also implicated in S. 2611, this paper will focus primarily on the bill's expansion of the Davis Bacon Act.

How S. 2611 Expands the Reach of the Davis Bacon Act

Under S. 2611, as passed by the Senate, wage rates determined under DBA would be applied to foreign temporary workers in all construction occupations – even if the project receives no federal funds and does not otherwise fall under the DBA. In other words, foreign workers employed in a construction job for which a DBA wage rate has been determined could be guaranteed wages higher than those paid to American workers doing the same job on the same private construction projects for the same employer.

The legislation accomplishes this via a provision in Title IV at Subtitle A of Section 404 that would trigger Davis-Bacon Act coverage for construction workers or SCA wages for service workers for those working under the new H-2C Temporary Guest Worker program that S. 2611 creates. S. 2611 allows 200,000 foreign workers a year under the new H-2C program. It cannot be determined how many of the 200,000 will be employed in construction work.

[8] USDOL, "What are the Davis-Bacon and Related Acts?"
[9] U.S. Department of Labor, "Compliance Assistance – McNamara-O'Hara Contract Act (SCA)," June 12, 2006. [http://www.dol.gov/esa/whd/contracts/sca.htm]

The Senate-passed immigration bill, therefore, extends the reach of Davis Bacon wages beyond its traditional scope. Instead of limiting the application of the DBA to jobs on federally-funded *projects*, S. 2611 expands the wage rate requirements to *all* foreign construction workers who are employed under the H-2C Temporary Guest Worker program. Specifically, the language in S. 2611 provides for the payment of prevailing wages if a job opportunity "is in an *occupation* that is covered by a wage determination under a provision of subchapter IV of chapter 31 of title 30, United States Code, or the Service Contract Act . . ." (emphasis added). By using the word "occupation" in the legislation instead of "covered job opportunity," the applicability of the DBA clearly is made to apply to all such jobs, not just work performed under federal or D.C. contracts.

While the reference in S. 2611 is not to the Davis Bacon Act, it is to an act requiring the General Services Administration's use of wage determinations for workers that are set by U.S. Department of Labor for construction of public buildings, i.e., the Davis Bacon Act. This is a common way in legislation to trigger the Davis Bacon Act without drawing attention to it by referencing a statute that contains a Davis Bacon requirement.

Current Application of Davis Bacon Act	**Expansion of Davis Bacon in S. 2611**
The Davis Bacon Act applies to: ▪ Construction contracts to which the U.S. or the District of Columbia is a party; for contracts over $2,000; and involves all U.S. and foreign workers. Davis Bacon Act requires the payment of local prevailing wages and fringe benefits by contractors and subcontractors working on a covered project.	S. 2611 would expand the reach of the Davis Bacon Act to: ▪ All H-2C temporary foreign workers employed on construction projects, whether or not they receive any government funding; and to all occupations in which a prevailing wage is determined under the Davis Bacon Act.

Expansion Unfair to U.S. Workers

The Davis-Bacon expansion in S. 2611 would affect the wages of temporary guest workers who are working side-by-side with other workers in private construction projects. While H-2C temporary guest workers would receive Davis Bacon wages set by regulators under S. 2611, U.S. citizens and other authorized foreign workers would be receiving true market wages. Davis Bacon wages tend to be inflated because of the bias caused by the wage-setting process that relies solely on voluntary wage data reporting rather than using a statistically verified sample. S. 2611 would create a situation where

H-2C foreign workers employed on the same project, doing the same construction job, would receive wages that exceed a U.S. workers' doing the same job.

Davis Bacon Wages are Unreliable as Market Wages

Many observers both within and outside of government have long viewed the Davis Bacon Act as a Depression-era law with an antiquated and unreliable process for determining the "prevailing wage" for affected workers.[10] The Department of Labor's Wage and Hour Division (WHD) is charged with "determin[ing] wage rates through surveys that collect data on wages and fringe benefits paid to workers in similar job classifications on comparable construction projects in the same geographical area."[11] The Government Accountability Office (GAO) and others have raised concerns for years that wage determinations issued under the DBA may not accurately reflect wages paid in the local area.[12]

Persistent problems with the accuracy of Davis Bacon wage determinations

Officials at the Department of Labor charged with determining local prevailing wage rates are limited in their ability to establish accurate rates because they must correctly identify the interested parties and successfully secure their participation.[13] DBA wage determinations "mirror the data that are submitted."[14] Therefore, the wage determination used under the DBA is only as accurate as the information submitted to the Department. The problem was documented in a March 2004 report by the Department of Labor's Office of the Inspector General, which found that errors resulted from a variety of causes, including contractors' confusion over what was being requested in the survey instrument, carelessness, and use of estimates and approximations.[15]

The reliability of wage determinations is also hindered because participation in Davis Bacon wage surveys is voluntary. This means that the surveys do not have statistical validity due to a lack of uniform participation among employers. The Department of Labor can rely only on data that is provided to them by employers and third parties. Therefore, wage determinations tend to favor unionized employers and

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[10] Congressional Research Service (CRS), "The Davis-Bacon Act: Issues and Legislation During the 109th Congress," CRS Report to Congress RL33363, April 25, 2006; U.S. Department of Labor Office of Inspector General (OIG), "Concerns persist with Integrity of Davis-Bacon Act Prevailing Wage Determinations," Report Number 04-04-003-04-420, March 30, 2004; [10] Statement by Kirk Pickerel, President and CEO, Associated Builders and Contractors, Public Works Online, May 25, 2006. [http://www.pwmag.com/industry-news-print.asp?sectionID=760&articleID=308858]

[11] U.S. General Accounting Office (GAO), "Davis Bacon Act: Labor's Actions Have Potential to Improve Wage Determinations," GAO/HEHS-99-97, May 1999.

[12] GAO, "Davis Bacon Act: Labor's Actions Have Potential to Improve Wage Determinations," May 1999.

[13] U.S. Department of Labor (USDOL), "Prevailing Wage Resource Book," November 2002. [http://www.wdol.gov/docs/WRB2002.pdf]

[14] USDOL.

[15] OIG.

union wages since there is no incentive (and perhaps there is a disincentive) for private-sector employers to provide wage information that may aid their competitors.

GAO Critical of Davis Bacon Credibility

Concern with the credibility of Davis Bacon wage determinations to accurately reflect local prevailing wages is not new. In January 1999, the GAO issued a report looking at the credibility of DBA wage data, reiterating its longstanding concern that the Department of Labor's (DOL) "procedures for determining prevailing wage rates were vulnerable to the use of inaccurate or fraudulent data."[16]

As the January 1999 GAO report discusses, in response to a Congressional directive and GAO recommendation, DOL implemented a program to verify wage survey data submitted to it. A private accounting firm was hired to conduct verification reviews. Based on its review at the time, the accounting firm "identified errors in wages reported in about 70 percent of the wage data forms reviewed."[17] Further, while DOL corrected a number of errors found by the accounting firm, its verification efforts had limited impact and increased the time required because DOL was only able to correct the limited number of wage data forms that were verified, which was only a small portion of the wage rates submitted.[18] Furthermore, it is estimated the average lifespan of a DBA wage determination is seven years. This raises questions as to whether DBA wage results truly reflect current conditions.

Labor's Inspector General Also Questions Davis Bacon Credibility

In March 2004, the Department of Labor's Office of Inspector General (OIG) conducted an audit and reported that concerns continued to persist with the integrity of DBA prevailing wage determinations. As the report discusses, Congress appropriated $22 million between FY 1997 and 2003 for the Department of Labor to improve its DBA wage determination system. Despite the infusion of money, the OIG found limited improvement.

The report found that errors in wage data had continued. Independent auditors compared wage surveys received prior to the receipt of the $22 million with those received in later years in expectation that the labor data would be more accurate. The auditors instead "found one or more errors existed in 100 percent of the wage reports" they reviewed after the $22 million investment to improve the program.[19]

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[16] U.S. General Accounting Office (GAO), "Davis-Bacon Act: Labor Now Verifies Wage Data, but Verification Process Needs Improvement," GAO/HEHS-99-21, January 1999. Note: GAO concerns about Davis Bacon credibility date back to at least 1962.

[17] GAO, "Davis-Bacon Act: Labor Now Verifies Wage Data, but Verification Process Needs Improvement."

[18] GAO, "Davis-Bacon Act: Labor Now Verifies Wage Data, but Verification Process Needs Improvement."

[19] OIG. Note: The Department of Labor has made an independent verification a permanent part of the survey process.

The OIG report also discusses the Inspector General's continuing concern that wage data may be biased. The report attributes this to the fact that statistical sampling of employers was not done. Obtaining a statistically-valid sample is key to assuring the data accurately represents the universe of employers being surveyed. Bias is inherent since the DBA relies only on information volunteered by employers and third parties, some of whom could have an interest in influencing the outcome of the prevailing wage determinations.[20] This bias can lend itself to inaccurate and sometimes inflated wage determinations.

Additionally, timeliness of wage determinations is still an issue, according to the OIG. The report notes that prior audits found large gaps in time between surveys, and long periods of time needed to complete and publish wage surveys.[21] The OIG report found some wage determinations were still in effect over long periods of time (one as much as 7 years) because they had not been updated by new surveys.

Expanding Davis Bacon Would Have a Costly Impact

Critics argue that the prevailing wage requirement in the Davis Bacon Act raises the cost of public construction. According to the Associated Builders and Contractors, the "Davis Bacon Act wage rules increase the cost of public construction projects anywhere from 5 to 38 percent above what the project would have cost in the private sector."[22] Because it sets a minimum pay scale on federal construction contracts, the DBA prevailing wage becomes the floor, raising average construction pay in the locality.[23] The cost-inflation factor in the DBA has caused the GAO to recommend changes to the Davis Bacon Act as a means of trimming the federal deficit.

Davis Bacon Raises Cost of Public Construction

The variations between Davis-Bacon wage rates and market rates can be substantial. Here are some examples:[24]

[20] OIG.
[21] OIG.
[22] Statement by Kirk Pickerel, President and CEO, Associated Builders and Contractors, Public Works Online, May 25, 2006. [http://www.pwmag.com/industry-news-print.asp?sectionID=760&articleID=308858]
[23] Investor's Business Daily, "Senate Immigration Bill Could Expand 'Prevailing Wage' Laws," May 26, 2006. [http://www.investors.com/editorial/IBDArticles.asp?artsec=16&issue=20060526&view=1]
[24] Note: In the chart, the Davis Bacon wage rates are from the Department of Labor's Wage Determinations Online website and do not include fringe benefit wages that are required in addition to the base rates show here. Under the Davis Bacon Act, each county may have a different wage rate so counties are identified where applicable. The market rates shown are the mean hourly wages from the Bureau of Labor Statistics' May 2005 Occupational Employment and Wage Estimates.

State	Occupation	Davis Bacon Wage Rate[25]	Market Wage[26]
Arizona	Plumber/Pipefitter	$22.42/hour (Cochise, Gila, Graham, Greenlee and Santa Cruz Counties)	$16.97/hour
	Electrician	$22.50/hour (Navajo and Yavapai Counties)	$17.50/hour
Illinois	Laborers	$28.00-$29.00/hour (Boone County)	$21.49/hour
Kansas	Brick Mason	$29.30/hour (Atchison, Brown, Doniphan and Franklin Counties)	$19.26/hour

GAO Called for Repeal of Davis Bacon as Deficit Reduction Effort

The expansion of elevated Davis-Bacon wage rates into private construction contracts established in S. 2611 would increase the cost of private construction, in a manner similar to that already documented for public construction. Dating back to 1997, the Government Accountability Office (GAO) recommended that the Davis Bacon Act be repealed, or the dollar threshold for projects covered by the Act be raised as options for deficit reduction.[27] Supporting the GAO recommendation is an analysis by the Congressional Budget Office estimating in 2005 that the five-year savings for repeal of the Davis Bacon Act would be about $4.4 billion.[28]

Davis Bacon Expansion Unnecessary to Protect Workers

S. 2611 contains numerous alternative means to satisfy the prevailing wage requirement for foreign temporary workers without expanding the reach of the Davis Bacon Act. The requirement to pay prevailing wages, as a minimum, is true of most employment-based visa programs involving the Department of Labor.

The Senate-passed bill establishes a set of steps an employer wishing to hire a temporary foreign worker is to take. S. 2611 requires that an H-2C foreign temporary worker will be paid not less than the greater of "the actual wage level paid by the

[25] Department of Labor's Wage Determinations Online, June 27, 2006, {www.wdol.gov]
[26] Bureau of Labor Statistics, "May 2005 Occupational Employment and Wage Estimates," June 2, 2006 [http://www.bls.gov/oes/oes_dl.htm]
[27] General Accounting Office, "Addressing the Deficit: Budgetary Implications of Selected GAO Work for Fiscal year 1998," GAO Report to Congress #GAO/OCG-97-2, March 14, 1997.
[28] Based on unpublished data provided by the CBO on June 28, 2006.

employer to all other individuals with similar experience and qualifications for the specific employer in question; or the prevailing wage level for the occupational classification in the area of employer, taking into account experience and skill levels of employees."[29] This requirement is intended to prevent both the hiring of temporary foreign workers in lieu of hiring U.S. workers and the undercutting of wages paid to foreign workers.

In determining the prevailing wage, S. 2611 first requires that, "if the job opportunity is covered by a collective bargaining agreement, the prevailing wage shall be the wage rate set forth in the collective bargaining agreement."[30] Therefore, any temporary foreign worker to be employed at a worksite where the job is covered by a collective bargaining agreement is to be paid the wage contained in the collective bargaining agreement. This is the first determination to ensure that the wages of the temporary foreign worker will not harm similar employed U.S. workers.

Next, according to the Senate-passed bill, "if the job opportunity is not covered by a collective bargaining agreement, the prevailing wage level shall be based on published wage data for the occupation from the Bureau of Labor Statistics." The Bureau of Labor Statistics (BLS) is the principal fact-finding agency for the federal government in the field of labor economics and statistics. The agency continually conducts surveys to provide comprehensive measures on earnings by occupation, made available on a metropolitan and non-metropolitan basis, as well as on a national basis.[31]

Furthermore, according to S. 2611, if the BLS does not have wage data applicable to such occupations, the employer may base the prevailing wage level on another wage survey approved by the Secretary of Labor. The Secretary shall promulgate regulations applicable to such other wage surveys that require, among other things, that the BLS determine such surveys are statistically viable.

Wage Program for Foreign Workers Already in Place

Existing prevailing wage requirements and programs already exist. These requirements are already in place to determine the payment of wages to temporary foreign workers in existing programs. None of the existing programs provide for the expansion of the Davis Bacon Act.

The current Foreign Labor Certification program already makes prevailing wage determinations for nonagricultural occupations. The existing program defines the prevailing wage rate "as the average wage paid to similarly employed workers in the requested occupation in the area of intended employment."[32] The requirement to pay

[29] S. 2611, Section 218B(c)2A
[30] S. 2611, Section 218B(c)2C
[31] www.bls.gov
[32] U.S. Department of Labor, "Foreign Labor Certification Prevailing Wages: Frequently Asked Questions," August 1, 2005. [http://workforcesecurity.doleta.gov/foreign/wages.asp]

prevailing wages, as a minimum, is true of most employment-based visa programs involving the Department of Labor.

Under the current program, the prevailing wage rate is usually obtained by contacting the State Workforce Agency having jurisdiction over the geographic area of intended employment or from other sources identified as legitimate sources of information.[33] To comply with existing statutes, the Department of Labor has regulations in place that require the wages offered to a foreign worker be at or above the prevailing wage rate for the occupational classification in the area of employment.[34] Furthermore, the BLS provides wage data collected under its programs for use in the Foreign Labor Certification process. The Davis Bacon Act, on the other hand, relies on data collected by the Wage and Hour Division, an agency within the Department of Labor responsible for regulatory compliance and enforcement, as opposed to statistically reliable data such as that collected by the BLS.

Additional Employee Protections in Place

Numerous other labor-related statutes provide for the protection of all workers in all U.S. workplaces. These laws and protections are already in place and extend to all workers employed in the U.S. The Fair Labor Standards Act (FLSA), for example, provides a structure of minimum wages, overtime pay requirements, and restraints on child labor for both public and private workers.[35] In fact, the U.S. Department of Labor formalized its position to broadly apply these laws following a 2002 Supreme Court decision regarding workplace protections available to undocumented workers under a different labor law. In its policy statement the Department of Labor said it "will continue to enforce the FLSA … without regard to whether an employee is documented or undocumented."[36]

Also, the Occupational Safety and Health Act requires each employer to provide to each of his employees a "place of employment which [is] free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees."[37] These worker protections provide for the safety of U.S. workers and foreign workers – regardless of status.

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[33] U.S. Department of Labor, "Foreign Labor Certification Prevailing Wages: Frequently Asked Questions," August 1, 2005. [http://workforcesecurity.doleta.gov/foreign/wages.asp]
[34] U.S. Department of Labor, "Foreign Labor Certification Prevailing Wages: Frequently Asked Questions."
[35] CRS, "Federal Contract Labor Standards Statutes: An Overview."
[36] Hoffman Plastic Compounds, Inc. v. NLRB No. 00-1595 (S. Ct.); U.S. Department of Labor, "Fact Sheet #48: Application of U.S. Labor Laws to Immigrant Workers: Effect of *Hoffman Plastics* decision on laws enforced by the Wage and Hour Division," June 21, 2006. [http://www.dol.gov/esa/regs/compliance/whd/whdfs48.htm] Note: In *Hoffman Plastics* the Supreme Court ruled that the National Labor Relations Board (NLRB) lacked authority to order back pay to an undocumented worker who was laid off from his job because of union activities. The Department interpreted that *Hoffman Plastics* does not apply to its statutes, such as the FLSA.
[37] 29 USC 654.

These protections and rights are on top of the various rights and protections made available by state laws. Moreover, many of these current protections also afford foreign workers the right to file legal actions in U.S. courts.

Recommendation and Conclusion: Remove Davis Bacon from Immigration Bill

A key intent of S. 2611 is to protect the wages of American workers and not allow for the exploitation of foreign workers. The intent can be accomplished by containing the reach of the Davis Bacon and Service Contract Act to federal projects and/or contracts. This would continue to provide for the protection of *all* workers on relevant federally-funded projects, but not trigger Davis Bacon problems onto private construction. By removing Davis Bacon requirements from S. 2611, sufficient measures would remain to protect the wages of U.S. and foreign temporary construction workers, and the well-documented problems with the Davis Bacon Act would not spread.

The expansion of the Davis Bacon and the Service Contract Acts is both inappropriate and unnecessary. The problems associated with the reliability of the wage-rate determination process and the costs associated with the Davis Bacon Act particularly should keep lawmakers from expanding it in any way.

Concerns with the Expansion of the Davis Bacon Act in S. 2611

- S. 2611 would extend Davis Bacon, government-set wages to workers employed on privately-funded construction.
- S. 2611 would permit H-2C temporary foreign workers to be paid a higher wage than similarly-employed workers on the same private project.
- S. 2611 would perpetuate biased and inaccurate wage determinations by expanding the reach of Davis Bacon wages.
- While foreign workers on projects covered by Davis Bacon are properly protected by existing law, expansion to private construction and "occupations" is unnecessary to prevent the exploitation of foreign workers.